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May 28, 2004

Docket No. NHTSA-04-17326
U.S. DOT Dockets, Room PL-401
U.S. Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

Procedures for Participating in and Receiving Data from the National Driver Register Problem Driver Pointer System, Notice of Proposed Rulemaking, 69 FR 16853 *et seq.*, March 31, 2004

Advocates for Highway and Auto Safety (Advocates) submits the following comments in response to the proposed rule of the National Highway Traffic Safety Administration (NHTSA) to amend the agency's National Driver Register (NDR) regulations to implement changes mandated by the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub.L. 106-159, Sec. 204). That legislation amended 49 U.S.C. § 30304 by directing each state to request from the Secretary the appropriate information on an individual's driving record both from the NDR under 49 U.S.C. § 30302 and from the Commercial Driver License Information System (CDLIS) under § 31309.

I. Cross-Checking National Driver Register with Commercial Driver Licensing Information System.

This proposed rule offers regulatory changes to ensure that driver license cross-checking of an individual operator's violation and licensing history is performed by the states because "the agency has determined * * * that as many as fifty percent of the currently participating States are not, in fact, following the amended provisions of Section 30304, requiring a check of both the NDR and the CDLIS." 62 FR 16853, 16855.[1]

[1] Advocates notes that this widespread, chronic failure to cross-check the records of individuals holding both personal vehicle operator licenses as well as CDLs is only now being acknowledged by NHTSA with proposed changes to abate this scofflaw response to a federal statutory mandate, four and one-half years after enactment of the MCSIA in December 1999. The safety benefits arguably achievable by the proposed

Accordingly, NHTSA has proposed in this rulemaking action to achieve appropriate safety benefits by ensuring that states no longer permit licensure without checking both the NDR and CDLIS. However, the agency characterizes the fraud that needs to be abated through cross-checking driving records as involving "a problem driver . . . successfully us[ing] the licensing process of one State to evade the penalties of a criminal conviction or license suspension of another State. . ." *Id.*

This an incomplete understanding of the importance of cross-checking the NDR and CDLIS for commercial motor vehicle (CMV) operators with CDLs. On July 31, 2002, with amendments published on January 29, 2003, in response to petitions for reconsideration, the FMCSA issued a final rule to adopt the several statutory mandates to the agency relating to the licensing and sanctioning of CMV operators required to hold CDLs. The agency amended 49 CFR 383.51 to implement Section 201 of the MCSIA directing the agency to impose a disqualification on CDL holders who have been convicted of traffic offenses while operating a non-CMV which result in their CDLs being canceled, revoked, or suspended; or of committing drug or alcohol offenses related offenses while driving a non-CMV. 67 FR 49742 *et seq.* (July 31, 2002); 68 FR 4394 *et seq.* (January 29, 2003). In the amended final rule, the FMCSA adopted a regulation that specifies that disqualifications for offenses committed by a CDL holder while operating a non-CMV apply if the conviction for such offenses results in the revocation, cancellation, or suspension of the CDL holder's non-CMV license or non-CMV driving privileges.[2] 68 FR 4395. Therefore, the baseline need for cross-checking the NDR with CDLIS for a CDL holder is not simply the issue of "successfully us[ing] the licensing process of one State to evade the penalties of a criminal conviction or license suspension of another State . . .," but also the need to ensure that CDL holders are not illegally seeking to continue CMV operation or to renew their CDLs in contravention of the various types and levels of disqualifications that are triggered by license revocation, cancellation, suspension, or other abridgments of non-CMV operation regardless of whether the CDL

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amendments in this rulemaking action have unconscionably been delayed, especially in light of several well-known reports and investigations of CDL abuses over the past few years, such as those performed by the U.S. Department of Transportation Office of the Inspector General and the October 2000 study published by the Federal Motor Carrier Safety Administration (FMCSA), *Evaluating Commercial Driver's License Program Vulnerabilities: A Study of the States of Illinois and Florida – Final Report,* October 2000. The CDL Panel issued several conclusions and recommendations in that report, the first of which was:

> 1. The single-license objective continues to be met; however, the Panel recommends that states implement measures that identify and deter fraud (i.e. electronic verification of Social Security numbers, *cross-checks of non-CDL applicants against the Commercial Drivers License Information System central site*).

"Evaluating Commercial Driver's License Program Vulnerabilities," *op. cit.*, p. 10 (emphasis added). A NHTSA determination that many states were not routinely performing cross-checking of the NDR and CDLIS should have been followed by appropriate regulatory action years ago. In this regard, the agency's action in this notice is dilatory treatment of a major safety issue that has undoubtedly produced adverse impacts on highway traffic safety.

[2] The full list of current disqualification periods and offenses that trigger them are provided at 49 CFR 383.51.

and non-CMV licenses are issued by the same state or by different states. Indeed, commercial drivers with CDLs who otherwise should have been disqualified have successfully evaded detection in their home licensing states where they have both CDL and non-CMV operator licenses because their home state has chronically failed to check the personal, non-CMV driving record of a CDL holder when issuing CDL renewals.

II. Proposed Definition of 'Employers' or 'Prospective Employers'.

NHTSA in this rulemaking action points out that current regulation uses the terms 'employer' or 'prospective employer' with regard to their rights of access to the driving conviction records of their drivers through the NDR. 69 FR 16854; 23 CFR 1327.6(c). The agency believes that this lack of precision in the definition of these terms "could lead to inconsistent practices by States or employers who participate in and receive information from the NDR." *Id.* However, NHTSA chooses to define these terms in a somewhat roundabout fashion by instead attempting to characterize those persons who have a "primary job function of operating a motor vehicle in the normal course of their employment." *Id.* The intent, then, is to specify which persons are 'employers' or 'prospective employers' by "narrowing the class of employees subject to an NDR check." *Id.* The agency elucidates this definitional tactic by providing an example of an employer who has an employee making "regular" business deliveries as against an employee who is allowed to use a company-owned or rented vehicle to attend a business conference or who takes an "occasional" business trip. *Id.* The first employee would be subject to NDR checks and, therefore, the person making such a request would be doing so properly since that person would legitimately be an "employer" or "prospective employer," whereas the second employee, because of infrequency and irregularity in the operation of a business-related activity, could not have his or her NDR information checked because the person making the request is not by definition an "employer" or "prospective employer."

Advocates believes that this approach to definitional characterization of the class of persons who legitimately can seek NDR information is fraught with pitfalls and is bankrupt from the outset. First, the test of regularity and frequency in business-related vehicle use by an employee is still fundamentally unspecified, and the available rationalizations for an employer either to improperly access the NDR or to argue that he or she had no responsibility to check a current or prospective employee's driving record are so obvious that it needs no labored exposition. This definitional approach imposes an enormous burden on states to make *ad hoc* judgments of whether an employer does or does not have a responsibility and right to access an employee's driving record, judgments that inevitably will vary from state to state. Contrariwise, it promises significant problems that can directly and adversely impact highway traffic safety because there is no practical way any state can determine that there are many employers who should be, but are not, inspecting the driving records of current or prospective employees. The agency needs a bright-line definition for demarcating the class of employers who have both the right and the responsibility to check employee driving

records; instead, NHTSA has supplied a wide gray zone of indeterminacy that can lead to serious disbenefits in traffic safety.

The upshot of the agency's proposed approach to delineating which employers have a responsibility to access and review driver records in the NDR will be potentially wide variations from state to state in the understanding and application of the twin prongs of a test using "frequency" and "regularity" instead of necessary and desirable national uniformity to ensure that cross-checking between states relies on the same standardized meaning of "employees" subject to NDR review. Numerous examples of small businesses with employees who perform multiple job functions, one of which is to engage in the relatively infrequent and irregular transportation of freight or passengers for compensation, are easy to adduce. If the agency's vague definition were to prevail in the final regulation – a definition that basically relies entirely on intuition and two purportedly contrasting anecdotal examples in the preamble – there clearly will be substantial potential for abuses. Those abuses will consist both of employers who improperly attempt access to a current or prospective employee's driving records, and those who exploit the vagueness inherent to notions of vehicle operation "regularity" and "frequency" to avoid the safety-related responsibility to examine an employee's driving record. In both circumstances, it will impossible in practice for states to hold employers accountable for flouting their responsibilities if the proposed definition were adopted.

For the reasons provided above, Advocates does not support the definitions of 'employer' and 'prospective employer' offered by NHTSA in this proposed rulemaking.

Respectfully submitted,
ORIGINAL SIGNED
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